Virginia Law Register

VOL. 6, N. S.] AUGUST, 1920. [No. 4

SERVICE OF PROCESS UNDER THE CODE OF 1919.

Inasmuch as service of process to commence legal proceedings is the very foundation upon which depends the validity of all judgments, orders and decrees subsequently entered in such proceedings, proper service of such process is of the highest importance. Where a judgment is entered by default upon process which is not served as required by statute, such judgment, unless the service of process is waived, is not voidable merely, but absolutely void and can be collaterally attacked at any time. Consequently the changes made by the code of 1920 in the law relating to service of process, should be of great interest to all practitioners.

This discussion of the service of process will be divided into different heads as follows:

I. BY WHOM SERVED; II. ON WHOM SERVED; III. WHEN SERVED; IV. WHERE SERVED; V. THE RETURN.

I. BY WHOM SERVED.

The principal changes made by the new code with respect to the person by whom process can be served are found in section 6041 of the law code which is a reënactment of section 3207 of the old code. This section is amended in three respects—first the new code provides that when "a return is made by any person not an officer verified by affidavit such return must be by a person not a party to or otherwise interested in the subject matter in controversy." The old code did not place any limitation upon the interest of the party making the return—that is, such a party might be a party to the suit or interested in the subject matter.

Another change made in this section is designed to make it clear that substituted service of process may be had in the manner prescribed in this section upon a married woman as well as upon

a man. There had been some doubt upon this question under the language of this section of the old code.

The third and most inportant change is found in the new provision added by the revisors, that, "a notice in writing, however, which has reached its destination within the time prescribed by law, if any, shall be sufficient, although not served in the manner above mentioned." As section 6062 provides that *"Any* summons or scire facias may be served in the same manner and by the same person as is prescribed for the service of a notice under section 6041, except where process is against a corporation, it would seem that only process not against a corporation which reaches its destination within the time prescribed by law is sufficient. The revisors state in their note to this section that this particular clause was added for the express purpose, among others, of changing the law as laid down in *Park L. & I. Co.* v. *Lane,* 106 Va. 304, holding that service on a wife was not sufficient where the return did not show that the purport of it has been explained to her, though summons, which was a summons commencing the suit, had been actually received by the husband in ample time to have defended the suit, so it is clear that the revisors intended this change to apply to processes of court as well as to notices.

This is a very salutary change in the law that immediately commends itself to the profession. However, *process* against a corporation must still be *served,* though apparently a *notice* to a corporation will probably be sufficient if received by it within the proper time. No good reason is perceived for this difference between service of notice to, and service of process against a corporation, and it is probably due to an oversight on the part of the revisors.

Particular attention is also called to the fact that this change in law also probably does not apply to either notices or processes in divorce suits, because the statutes, sections 5016 and 6042, specifically provide that all processes and notices must be served by officers.

It is also doubtful whether this change applies to service of notice for a motion for judgment, because the motion statute, section 6064 of the new code, requires the notice to "be returned to the clerk's office of such court *within five days after service*

of the same." In the case of Swift & Co *v.* Wood, 103 Va. 495 it was held that a judgment on a notice not returned until six days after service, was invalid. Even if the courts were inclined to hold tha actual receipt by the defendant, in the time required by law, of a notice of a motion for judgment is a sufficient notice, it would be practically impossible to show that such notice had been returned to the clerk's office *within five days after service of the same.*

Still another change is found in an entirely new section. Section 6057 provides:

> "That the sheriff of any county in which is situated a city or any part thereof may execute in such city or part any process which he might execute in any other portion of his county."

The revisors might also have added a reciprocal provision that officers of cities might execute process throughout the territorial jurisdiction of the courts in which they qualify and give bond.

II. On Whom Served.

The principal changes made by the new code as to the person upon whom process is to be served are found in sections 6063 and 6064 dealing with service of process upon corporations, domestic and foreign.

Under the provisions of the old code process against a domestic corporation had to be served on one of the officers named, in the county or corporation in which the case was commenced, and if none of the officers named could be found in such county or corporation, then such process could be served upon any agent of such corporation found in such county. And if neither the officers nor any such agent could be found in such county then the process could be served by publication in a newspaper printed in this state once a week for four successive weeks. The Supreme Court of Appeals of Virginia first held that service on process against a domestic corporation by publication as provided in this section of the old code was valid in the case of *Ward Lumber Company* v. *Henderson-White Manufacturing Company,* 107 Va., page 626; and subsequently it was held the service of process upon a foreign corporation by publication un-

der this section was valid. *See N. & W. R. R. Co.* v. *Crull,* 112 Va. 151. Under the new code, service of process upon corporations is divided into two sections; section 6063 provides for service upon domestic, and section 6064 provides for service upon foreign corporations.

Section 6063 provides that processes against a municipal corporation shall be served on its mayor, recorder or any alderman, councilman or trustee of such municipal corporation and process against any other domestic corporation shall be served on its president or chief officer, cashier, treasurer, secretary, general superintendent or any of its directors or any agent of such corporation or any person declared by the laws of this state to be such agent, if such officer or agent be found in the city or county in which the suit is commenced, and whether so found or not, it may be sent to the county or city in which is situated the principal office of such company and there served on any officer or agent of such company found at such office. An exception is made apparently in the case of insurance, guaranty, trust, indemnity, fidelity or security companies created by the laws of this State, which will be dealt with hereafter.

Therefore it would seem that except in the cases of municipal corporations and domestic insurance, etc. companies process may be served upon a domestic corporation by serving the same upon any officer or agent in the county or corporation in which the suit is begun, or upon any officer or agent of such company found at the principal office of such company in this state. No distinction is made between the service of process upon an agent and upon an officer and process may be served upon such agent or officer either in the county or corporation in which the suit is begun or the county or corporation in which the principal office of such company is located, as the plaintiff may elect. It is well to note, however, if the process is served in the county or corporation where the principal office is located it must be served upon an officer or agent of the corporation *found at such office.*

The provision relating to insurance, guaranty, trust, indemnity, fidelity and security companies found in this section does not deal specifically with the officer or person by whom, or with the county or corporation in which, process against them can be

served but merely provides that in such cases the process or notice shall be directed to the sheriff or sergeant of the county or city wherein the chief office of such company is located.

Inasmuch as section 6055 of the new code provides that if process appear to be duly served and good in other respects it shall be deemed valid *though not directed to any officer or if directed to an officer though executed by some other person*, it is difficult to understand just what the revisors meant by providing in section 6063 that process against insurance etc. companies should be *directed* to the sheriff or sergeant of the county or city where the chief office of such company is located. Though process should be so *directed* in a case against such company, it would seem, under section 6065 that a process might be *served* by some other officer, or, under section 6041, even by a private person. This provision, dealing merely with how process shall be directed in case of insurance etc. companies is all the more puzzling in view of the fact, that, in changing the form of the section of the code dealing with service of process under section 3220 of the old code, and carried in section 6055 and 6056 of the new code, the revisors changed the language so as to provide that in a suit brought under section 6050 of the new code, 3215 of the old code, the process should be *executed* only in the county or corporation wherein the suit is brought, except in certain cases.

The old code provided that, with the exceptions named, process in such case should not be *directed* to the officer of any other county or corporation. The revisors in their note point out that the question is not so much one *to whom process may be directed* as to *who may execute* the process and *where* it may be *executed*.

Section 6064 of the new code provides for service of process upon foreign corporations. It requires such process to be served upon the statutory agent of such corporation, if any. In this connection, section 3845 of the new code provides that every foreign corporation doing business in this state shall appoint the *secretary of the commonwealth* and his successors in office, as its agent, upon whom all process against or notice to such corporation shall be served, and who shall be authorized to enter an

appearance in its behalf. The section further provides that the service shall *only* be made upon the secretary of the commonwealth, or in his absence upon the person in charge of his office and shall be made in duplicate.

Under the provisions of the old code foreign corporations were required to appoint a statutory agent residing in this state for the service of process but might appoint whatsoever agent it chose, except, if such foreign corporation was an insurance company it was required to appoint the commissioner of insurance.

Section 6044 of the new code further provides that if such foreign corporation has no statutory agent, process may be served on any other agent of such corporation in the county or city in which he resides or has his residence or place of business; and it further provides that if there be neither statutory agent nor any other agent found in this state upon whom process can be served, then, on affidavit of that fact, an order of publication may be awarded.

A new provision of the code is added in section 6058 of the new code which provides that:

> "All unincorporated associations or orders may sue and be sued under the name by which they are commonly known or called, or under which they do business and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. *Process against such association or order may be served on any officer or director* of such association or order."

III. WHEN SERVED.

The old code provided in section 3227 that process, served upon an agent, or out of the county or corporation in which the suit is brought, should be served at least ten days before the return day, and it was repeatedly held that these provisions of the old code were mandatory and that a judgment by default based upon a process not served in accordance therewith was void. Both of these provisions, however, are entirely omitted in the new code.

The revisors state that the reason for the omission of these

provisions was the improvement in facilities for travel and communication so that service such a great length of time before the return day is immaterial. Another reason would seem to be that, under the old code pleas in abatement had to be filed at rules to which the writ was returnable, unless an appearance was entered on that date, in which event, the plea in abatement had to be filed at the next succeeding rules, but under the provision of the new code the plea in abatement can now be filed at the next rules after the return of the writ duly executed without, entering any appearance at all. See code of 1919, Sec. 6105 and note.

It is important, however, to observe in the case of a foreign corporation (which has appointed the secretary of the commonwealth as statutory agent, as it is required to do by section 3845), the process must be served upon the secretary of the commonwealth, or, in his absence, upon the person in charge of his office, *at least ten days before any judgment can be entered against such foreign corporation.* This provision does not require the process in such case to be served ten days before the return day, but only ten days before *any judgment* can be rendered. It will be noted that section 3845 also provides, in the case of foreign corporations, that "the service shall *only* be made upon the secretary of the commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate." This section is in apparent conflict with section 6064 which provides that process may be served upon any other agent of a foreign corporation, where there is no statutory agent.

IV. WHERE SERVED.

Under the old code, the question of the place where process could be served was sometimes a very complicated one, especially in actions brought under section 3215 of the old code, where the only ground of jurisdiction was that the cause of action arose in the county or corporation wherein the suit was brought.

Section 3220 of the old code provided that where an action was brought under section 3215 of the old code process could not be directed to an officer of any other county or corporation, except where the action was against two or more defendants on

one of whom service was had in the county or corporation wherein the action was brought, or unless the action was against a railroad, express, canal, navigation, turnpike, telegraph or telephone company, or upon a bond taken by an officer under authority of some statute, or to recover damages for a wrong. The courts had held that the inhibition against *directing a process* to the officer of some other county or corporation really meant that the process could not be *served* in another county or corporation. As a result, it was questionable whether in a suit against a foreign corporation upon a contract, where the cause of action arose in a county or corporation in which such corporation had no agent, either statutory or otherwise, a process could be served at all except by publication even if such corporation had a statutory agent in some other county or city. In such case the only court having jurisdiction would be that of the county or corporation wherein the cause of action arose, but process could not be sent out of such county or corporation to be served, and could only be served by publication. The new code, however, provides specifically that process can be executed outside of the county or corporation in which the action is brought in all cases where the defendant is a corporation. There seems, however, to be some conflict between this section and section 6063 which provides that if the suit be against a domestic insurance, guaranty, trust, indemnity, fidelity or security company, the *process shall be directed* to the sheriff or sergeants of the city or county wherein the chief office of such company is located.

If the revisors meant that process in such cases could not be served in any county or corporation except that in which the principal office of such company is located it is difficult to understand why they did not say so instead of merely saying that the process should not be *directed* to the officer of any other county, especially in view of their note to section 6056 in which they say:

"The question is not so much one *to whom process may be directed,*" and this idea is expressed in the revised section. The language of the second paragraph of the revised section includes "all corporations" and is not restricted to a railroad, express canal, navigation, turnpike, telegraph or telephone company, as was the case formerly.

The new code provides that if process be duly served and good in other respects it shall be deemed valid "though not directed to any officer or if directed to an officer though executed by some other person." The revisors, in revising section 3220 of the old code, not only left out the provisions as to the officer to whom the *process might be directed,* but called special attention to the change and stated that the question was *not how the writ was to be* directed, but a question as to *where* or by whom it was to be *executed;* and still we find in section 6063 the provision that in the case of domestic insurance, trust, guaranty, etc. companies, the process shall be *directed only* to the officer of the county or corporation wherein the principal office of such company is located. The revisors' note to this section indicates that they intended that process against an insurance, trust, guaranty, etc. company should be executed only in the county or corporation in which the principal office is located, but it is very doubtful whether the language used accomplishes this end.

To summarize:

Process or notice to commence a suit, action or motion, may be served anywhere in this state except as follows:

1. Process against a domestic corporation (other than an insurance, guaranty, trust, indemnity, fidelity, or security company) in any kind of proceeding may be served in either the county or corporation wherein the proceeding is instituted, or in the county or corporation wherein the principal office of such corporation is located, though in the latter case it must be served upon an officer or agent *found at such office.*

2. Process against a foreign corporation, if such corporation has appointed the secretary of the commonwealth its statutory agent as required by section 3485, can be served *only* on the secretary of the commonwealth, or, *in his absence,* upon the person in charge of his office, and the inference is that it must be served in Richmond, where the office of the secretary is located. If such foreign corporation has not appointed the secretary of the commonwealth its statutory agent, then *probably* process may be served on any agent of such corporation in any county or corporation in which he resides or has his place of business. It is

said that process can *probably* be served on such other agent in the county or corporation wherein he resides or has his place of business, for the reason that sections 3845 and 6064 are in apparent conflict. Section 3845 requires every foreign corporation to appoint the secretary of the commonwealth its statutory agent on whom all process against it shall be served, and provides distinctly that "the service shall only be made upon the secretary of the commonwealth," etc. while section 6064 provides that if there be no statutory agent of such foreign corporation then the service may be upon any other agent, etc. Where the service is had upon the secretary of the commonwealth, the inference is that it must be made in Richmond where the law requires him to keep his office. It is possible though that service upon the secretary of the commonwealth elsewhere in the state may be held valid, as the statute is silent as to the place where the process is to be served upon the secretary of the commonwealth.

If no statutory or other agent of a foreign corporation be found in this state, then, on affidavit of that fact, an order of publication may be awarded against such corporation.

3. In any action, suit or motion brought under section 6050 of the new code (3215 or the old code)—that is, in cases where the sole ground of jurisdiction is that the cause of action or some part thereof arose in the county or corporation in which the action or suit is brought, the process can be sent out of such county or corporation to be served only in the following five cases:

1. An action against a corporation;

2. An action on a bond taken by an officer under authority of some statute;

3. An action to recover damages for a wrong;

4. An action against two or more defendants, on one of whom such process has been executed in the county or city in which the action is brought; and

5. In any action where it is otherwise especially provided.

In this connection it is well to note that in divorce suits the court for the county or city in which the parties last cohabited,

has jurisdiction under section 5105, in which event process could be served on the defendant anywhere in this state.

There are special provisions in the code relating to service of process in particular proceedings and against particular parties. Such as convicts, etc., but no discussion of them in this paper is deemed appropriate.

V. THE RETURN.

Section 6041 requires the officer to make a return of the "*time* and *manner* of service." This provision corresponds and is identical with the same provision carried in section 3207 of the old code.

Section 6066 provides, that the return on a process against, or notice to, any corporation, except where served on the statutory agent of a foreign corporation, shall show that the process or notice was served by delivering a true copy thereof to the agent of such corporation in the county or city wherein he resides or his place of business is, or the principal office, of the corporation is located; otherwise it shall not be valid.

These provisions with respect to the return, however, are not very important in any case that is contested, because section 6103 provides:

> "A defendant on whom a valid process summoning him to answer appears to have been served, shall not take advantage of any defect in the writ *or return* unless the same be pleaded in abatement. And in every such case the court may permit the return to be amended upon such terms as to it shall seem just."

However, if the case is not contested and a judgment is rendered *by default,* upon a return which shows defective service, it would seem that the judgment would be void. *Staunton Perpetual B. & L. Co.* v. *Haden,* 92 Va. 201; Park L. & I. Co. *v.* Lane, 106 Va. 304; Crockett *v.* Etter, 105 Va. 679.

Of course, any defect in a writ commencing a suit, or in the service or return thereof may be, and is waived by a general appearance. The filing of a plea in abatement for such defect is not a general, but a special appearance, only. Any appear-

ance must be general or special. If it is general, that waives the defect in the writ or return; if it is special, the defect may be cured by amendment. That is why it is said that a defective return is immaterial in any contested case. If, however, the writ itself is not merely defective, but absolutely void, no plea in abatement is necessary, but the writ should be quashed and the case dismissed on motion of the defendant or by the court on its own motion. Warren *v.* Saunders, 27 Grat. 259. But since the object of the writ is merely to summon the defendant into court, his appearance there in response to even a void writ, *without objection,* is held to be a waiver of process. Harvey *v.* Skipwith, 16 Grat. 410; N. & W. R. Co. *v.* Sutherland, 105 Va. 549.

But even in cases where a judgment is rendered by default upon a return showing defective service of the process, or where the process itself is defective, the defendant has a plain adequate remedy at law and cannot *enjoin* collection of the judgment. Section 6333 of the new code, which is identical with the same provision in the old code, provides:

> "The court in which there is a judgment by default or a decree on a bill taken for confessed, or the judge of such court in vacation thereof, may, on motion reverse such judgment or decree for any error for which an appellate court might reverse, if the following section was not enacted, and give such judgment or decree as ought to be given."

In *Goolsby* v. *St. John,* 25 Grat. 146, it was held that this section applied where the judgment was entered by default upon a return of the process which showed a substituted service thereof not in accordance with the statute; and that defendant in such case could not seek relief in equity but should have applied to the court in which the judgment was rendered, and moved to set aside the judgment, after notice to the plaintiff. In the case of *Brown* v. *Chapman,* 90 Va. 174, it was held, that, even in a case where the process was directed to the sheriff of a county other than that in which the action was brought, contrary to law, and therefore invalid, a judgment thereon by default should be corrected by the court rendering the judgment, upon motion

of the defendant under this section of the code, and that a court of equity would not enjoin the collection of the judgment. The motion for the correction of the judgment under this section must be made *within three years* after the date of the judgment or decree. Whether or not a court of equity would give relief in any case where a motion would be proper under this section but was not made within the time limited by this section appears never to have been decided. In other cases it is held that where the return shows that the process has not been executed as the statute directs, the judgment thereon is void, and can be collaterally attacked by third parties; and yet in both of the above cases the court said the judgment was not void but erroneous. It seems impossible to reconcile these decisions and no attempt is made to do so.

With respect to the officer's return, it is well to bear in mind that the return of an officer upon a process is conclusive, and cannot be impeached (however false it may be), unless it can be shown that the plaintiff procured or induced the return, or was in some way connected with the deception. The rule is the same whether the objection to the return is made at law or in equity. The policy of the law is that all these records should be relied upon by the world and if the officer makes a false return the party injured can have recourse against the officer upon his official bond. *Sutherland* v. *Peoples National Bank,* 111 Va. 515; *Ramsburg* v. *Kline,* 96 Va. 465.

JNO. D. EASLEY.

Lynchburg, Va.